



WILLIAMS MULLEN

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October 2, 2007

BY ELECTRONIC TRANSMISSION

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, S.W.
Washington, DC 20554

Re: Notice of Oral Ex Parte Presentations in Connection With the
Consolidated Application for Authority to Transfer Control in Connection
With the Sirius/XM Merger, as Amended
(MB Docket No. 07-57)

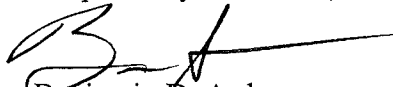
Dear Ms. Dortch:

On October 2, 2007, Messrs. Julian L. Shepard and Jerry W. Kilgore of Williams Mullen, and Messrs. J. Gregory Sidak and Hal J. Singer of Criterion Economics, L.L.C., representing the Consumer Coalition for Competition in Satellite Radio ("C3SR"), met with Ms. Angela E. Giancarlo and Ms. Cristina Chou Pauzé, Legal Advisors to Commissioner McDowell. The purpose of the meeting was to discuss C3SR's concerns with the proposed merger of XM Satellite Radio Holdings Inc. ("XM") and Sirius Satellite Radio Inc. ("Sirius") and the above-referenced application.

C3SR presented its grounds for opposition to the merger as set forth in its Petition to Deny and in the Declarations of Professor Sidak in this proceeding. C3SR's presentation is summarized in the attached document, entitled "Antitrust Analysis of Proposed XM-Sirius Merger," produced by Messrs. Sidak and Singer.

Pursuant to Section 1.1206 of the Commission's Rules and DA-07-1435, this letter is submitted via ECFS for inclusion in the public record of these proceedings, with an email copy to the above-mentioned meeting participants.

Respectfully submitted,


Benjamin D. Arden
Counsel to C3SR

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Attachment

cc (by email):

Ms. Angela E. Giancarlo

Ms. Cristina Chou Pauzé

Antitrust Analysis of Proposed XM-Sirius Merger

J. Gregory Sidak, Georgetown University Law Center
Hal J. Singer, Criterion Economics

Overview

- Market Definition
- Assault on the Merger Guidelines
- Review of Efficiencies/Concessions
- Appropriate Course of Action for FCC

Market Definition

- Would increasing the price by \$0.65 per month cause sufficient defections from SDARS to terrestrial radio, iPods, mobile telephones, and Internet radio?
- The answer depends primarily on the elasticity of demand for SDARS
 - XM and Sirius have failed to provide any compelling evidence despite having filed three economic reports

“Audio Entertainment” Is Not a Recognized Product Market

<i>Agency</i>	<i>Unique Hits</i>	<i>Is the term synonymous with the merging parties’ definition?</i>	<i>If yes, is term used in an antitrust context?</i>
DOJ	0	No	NA
FTC	45	No	NA
FCC	24	No	NA

Similar results obtained from survey of antitrust court decisions and law reviews.

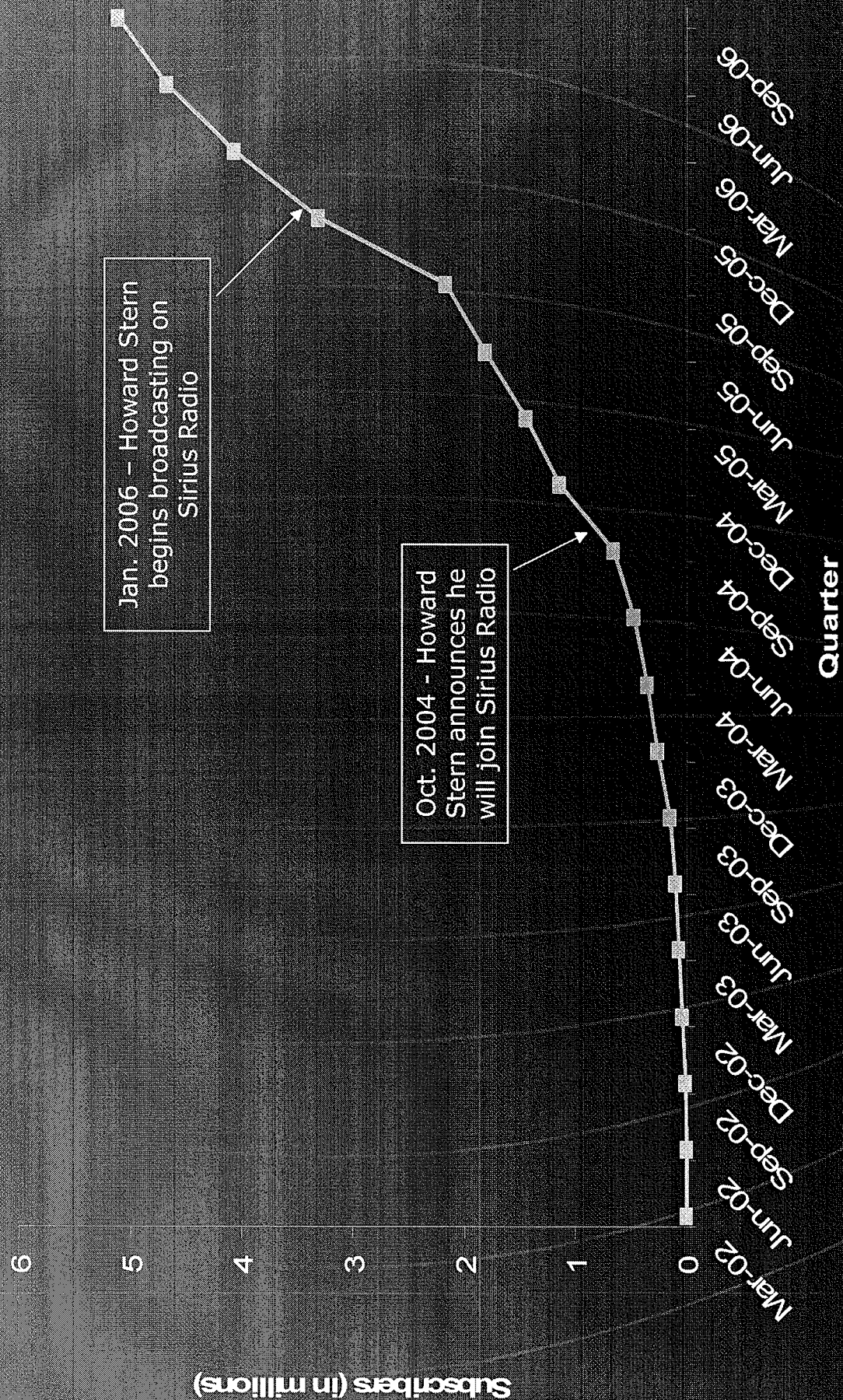
Evidence of Inelastic Demand for SDARS

- Formal econometric estimate is difficult due to lack of price variation
- But qualitative evidence is strongly suggestive that demand is inelastic
 - Response to actual price increase: On April 2, 2005, XM increased its monthly price from \$9.99 to \$12.95 to bring its price in line with the price of Sirius—an increase of nearly 30 percent.
 - High switching costs: Hardware cost for iPod or HD Radio are significant.
 - Low churn: The churn rate for SDARS is less than two percent per month, which Sirius says is the lowest among all subscription-based services.

Indecency Standards Limit Substitution, Further Decreasing Price Sensitivity

- Indecent content attracts a significant portion of SDARS subscribers
- XM and Sirius have never seriously addressed the antitrust relevance of indecency regulation for market definition

Sirius Subscribers per Quarter



<i>XM Satellite Radio "XL" Channels</i>	<i>Sirius Channels*</i>
The Boneyard: 80s Hard Rock	Octane: Hard Rock
XM Liquid Metal: Heavy Metal	Shade 45: Uncut Hip-Hop
Squizz: New Hard Rock	Howard 100: Howard Stern
Fungus: Punk, Hardcore & Ska	Howard 101: Bubba the Love Sponge, Scott Farrell and Uncensored Talk
The Rhyme: Classic Hip Hop/Rap	Raw Dog: Uncensored Comedy
Raw: New Uncut Hip Hop	Maxim Radio
XM Comedy: Uncensored Comedy	Cosmo Radio
Laugh Attack: Uncensored Comedy	Playboy Radio
The Virus: Opie & Anthony/Ron & Fez	Faction: Action Sports-Themed

Unique Characteristics of SDARS Also Limit Substitution (1 of 3)

- Key differences with broadcast radio
 - Greater format diversity
 - Exclusive programming (Stern, MLB)
 - Commercial-free
 - Nationwide coverage
 - Rear-seat video signals

Unique Characteristics of SDARS Also Limit Substitution (2 of 3)

- Key differences with iPods/MP3s
 - Podcasts are not delivered in real-time
 - Exclusive SDARS content is not available for iPods
 - The docking technology for iPods in automobiles is cumbersome and prone to interference
 - Getting the iPod to play in a car is very expensive

Unique Characteristics of SDARS Also Limit Substitution (3 of 3)

- Key differences with Internet radio
 - Fixed Internet service cannot seriously be considered a substitute for SDARS (a mobile service)
 - Mobile Internet service has barely arrived, the quality is unacceptable, and the price is unattractive to SDARS customers
- Key differences with mobile telephone
 - Audio content offerings by mobile telephone operators are not compelling to SDARS subscribers

Audio Content Provided by Mobile Wireless Operators

Wireless Provider	Price of Unlimited Data Plan	Audio Content Plan (Number of Channels)	Incremental Price of XM or Sirius Plan (Number of Channels / Provider)	Total Price of Mobile Telephone Package	Price of XM or Sirius for an SDARS Customer
	(A)	(B)	(C)	(A + B + C)	
AT&T	\$19.99	\$8.99 (50)	\$8.99 (25 of XM)	\$37.97	\$12.99
Alltel	\$10.00	\$6.99 (40)	\$7.99 (20 of XM)	\$24.98	\$12.99
Sprint-Nextel	\$0.00	\$20.00 (50)	\$6.95 (20 of Sirius)	\$26.95	\$12.99
Verizon	NA	\$15.00, \$1 per song	NA	NA	\$12.99

Assault on the Merger Guidelines

- Impermissible use of supply-side evidence for market definition
- Expand the two-year time horizon for entry analysis
- Alter the SSNIP test due to “dynamic demand” considerations
- Replace consumer welfare with total welfare

Likely Anticompetitive Effects

- Higher prices for SDARS subscribers under any possible pre-merger form of competition (conduct parameter) except perfect collusion
 - Partially addressed by price freeze for the short-run
- Additional commercials on satellite radio channels
 - Karmazin: Seeks to increase advertising share of total revenue from 4 to 10 percent
 - Not possible in absence of merger

Alleged “Merger-Specific” Efficiencies Are Merely Concessions to Gain Merger Approval

- The offer of à-la-carte pricing
 - No merger necessary
 - Likely to be small demand for packages without “indecent” content
 - Per se violation of section 1
- The offer of interoperability
 - CRA’s theory that the merger decreases “free-riding” is not plausible

Conclusions

- A merger to monopoly
- XM and Sirius have failed to introduce credible evidence that
 - product market should be defined more broadly
 - efficiency gains offset anticompetitive effects
 - the remedies proposed would mitigate monopoly power
- The FCC should deny the application